

In re Interest of Mischa S.

Caselaw No.

22 Neb. App. 105

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SUMMARY: In adjudication cases, the proof required for active efforts under ICWA is by a preponderance of the evidence. Active efforts were provided in this case; however, removal of the children was improper because there was not evidence of serious emotional damage as required under ICWA. A court's sua sponte determination that a statute in ICWA was unconstitutional as applied was void because it was not raised in the motion for removal or during the hearing.

Mischa, born in 1998, is the oldest child of seven of Deanna and Chris. Deanna is a member of the Oglala Sioux Tribe. Her children are not members but Deanna has said they are eligible for enrollment. On January 3, 2012, the State filed a petition under 43-247(3)(a) as to Mischa due to her and her siblings' excessive absences and tardies at school over the prior four years. The parents entered a no contest plea and Mischa was adjudicated on May 8, 2012. The children remained in home. On January 24, 2013, the GAL filed a motion to remove Mischa from her home. A hearing was held on February 1, 2013 but continued to February 25 to allow for proper notice to the tribe. At the hearing on February 25th, the dean of students testified that Mischa missed school from the third day of the school year to Halloween 2012, then attended 2 or 3 days a week for a couple of weeks before her attendance dropped again around Thanksgiving. Between February 1 and 25, Mischa was tardy 8 times and absent 3 times. On February 25th, Mischa had accrued only 11 credit hours when she should have had 60, which makes it very difficult to graduate in four years. The school had made efforts, including re-arranging her schedule, offering alternative education, and considering half day attendance but Mischa kept presenting several excuses, which made it difficult to identify and meet Mischa's needs. Mischa's caseworker testified that since early December 2012, a family support worker arrived at the home four mornings per week to ensure Mischa attended school but that there were still issues with Mischa getting from the car into school. The caseworker testified he was trained in identifying abuse and neglect but did not feel Mischa would suffer serious physical harm if she stayed in the family home. On February 26, 2013, the court ordered Mischa to be removed into foster care, found that serious emotional damage would result because of insufficient education and that Neb. Rev. Stat. 43-1505(5) was nonetheless unconstitutional as applied because Mischa deserved the same educational opportunity. The parents appealed.

The Nebraska Court of Appeals reversed the court's order. It first addressed whether the issue was moot because Mischa had already returned home by May 2013, and concluded it was not because the ICWA issues on qualified expert witnesses and active efforts could be raised in the future in this case and could also provide guidance in other cases. As to the issue of expert witness testimony required under ICWA on serious emotional or physical damage for remaining in the home, the Court of Appeals concluded no witness would have qualified as an expert witness under ICWA and that, regardless, the caseworker testified he didn't believe serious physical harm would result if Mischa remained in the home. As to the

juvenile court's sua sponte finding that Neb. Rev. Stat. 43-1505(5) was unconstitutional as applied in this case, the Court of Appeals determined the juvenile court lacked authority to come to such a conclusion because the issue was not raised in any motion or pleading, nor was it presented at the hearing. Finally, as to the issue of active efforts, the Court of Appeals noted that the ICWA language on active efforts does not have a standard of proof like it does for serious emotional or physical damage. It referenced *In re Interest of Walter W.*, 274 Neb. 859, 774 N.W.2d 55 (2008), which held that because ICWA didn't impose a heightened standard of proof within its statutes for active efforts in TPR cases that it would only apply the clear and convincing standard that generally applies to TPR cases. In this case, the Court of Appeals maintained the same reasoning and held that the standard of proof for active efforts in adjudication cases is by a preponderance of the evidence.

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